

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STEVEN BASSETT,)
individually, and on behalf)
of all others similarly)
situated,)
Plaintiff,) Appeal No. 16-35933
vs.) No. 2:16-cv-00947-TSZ
ABM PARKING SERVICES, INC.)
(d/b/a "Ampco System)
Parking" and "ABM Onsite)
Services - West"), ABM)
ONSITE SERVICES - WEST,)
INC., and ABM INDUSTRIES,)
INC.,)
Defendants.) Motion Hearing
) October 13, 2016

AMANDA DOUGHERTY,)
individually and as a)
representative of the class,)
)
Plaintiff,) No. 2:15-cv-01501-TSZ
)
vs.) Seattle, WA
)
BARRETT BUSINESS SERVICES,)
INC.,)
) Motion Hearing
Defendants.) October 13, 2016

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1 SARAH CONNOLY,)
2 individually and on behalf)
3 of all others similarly)
4 situated,)
5)
6 Plaintiff,) No. 2:15-cv-0517-TSZ
7)
8 vs.) Seattle, WA
9)
10 UMPQUA BANK,)
11) Motion Hearing
12 Defendants.) October 13, 2016

13 VERBATIM REPORT OF PROCEEDINGS
14 BEFORE THE HONORABLE JUDGE THOMAS S. ZILLY
15 UNITED STATES DISTRICT COURT

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1 THE COURT: Will the clerk please call the calendar?

2 THE CLERK: Thank you, Your Honor. I'll be calling
3 three cases. I'll start with the Bassett case, CV16-947Z,
4 Steven Bassett vs. ABM Parking Services, et al.

5 Counsel, please stand and make your appearance for the
6 record.

7 MR. LOVE: Good morning, Your Honor. May it please
8 the Court, Chris Love here, for Plaintiff Steven Bassett.

9 THE COURT: Good morning, Mr. Love.

10 MR. LORBER: Good morning, Your Honor. Abraham
11 Lorber of Lane Powell, for Defendant ABM Parking Services.

12 THE COURT: Good morning.

13 Please call the next matter on the calendar.

14 THE CLERK: Thank you, Your Honor. Case number
15 CV15-1501Z, Amanda Dougherty vs. Bassett Business Services.

16 Counsel, please stand and make your appearance for the
17 record.

18 MS. DRAKE: Good morning, Your Honor. Michelle
19 Drake, on behalf of Plaintiff Dougherty.

20 THE COURT: Good morning.

21 MR. VANCE: Good morning, Your Honor. Joseph Vance,
22 with Miller Nash Graham and Dunn, on behalf of the defendant,
23 BBSI.

24 THE COURT: Good morning.

25 THE CLERK: And the next case, Your Honor, is

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1 CV15-517Z, Sarah Connolly vs. Umpqua Bank, et al.

2 Counsel, please stand and make your appearance.

3 MS. DRAKE: Your Honor, Michelle Drake, again. I'm
4 also appearing on behalf of Ms. Connolly.

5 THE COURT: Good morning, again.

6 MS. DRAKE: Thank you.

7 MR. HOWARD: Your Honor, Jim Howard, on behalf of
8 Defendant Umpqua Bank. And I have here with me Andy Hannon,
9 in-house counsel for Umpqua Bank.

10 THE COURT: All right. Well, this is a rather
11 unusual hearing, because there are three cases which I have
12 brought together for this hearing. The Court entered a minute
13 order a few weeks ago, setting this time and place for
14 argument. And I indicated that all three of these cases arise
15 in the context of a motion to dismiss on the pleadings,
16 although for different -- I think there's a 12(b)(6) motion,
17 there's a 12(b)(1) motion, there's a 12(b)(3) motion. But they
18 all raise the *Spokeo* issue of what constitutes -- what type of
19 statutory violation will confer Article III standing.

20 I felt it was appropriate that I allow all of you to argue
21 at the same time, basically, because what I might do in one
22 case might affect what I would do in the other case, because
23 they are similar in nature, and that is trying to come to grips
24 with the fallout from *Spokeo*, and what, in fact, constitutes
25 Article III standing post-*Spokeo*.

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1 As the lawyers probably know, there have been five
2 circuits that have dealt with this issue, and we have a
3 three-to-two split in the circuits. Perhaps the lawyers will
4 be talking about some of those circuit decisions. We have
5 probably 30-plus district court decisions that are published.
6 And as you might expect, they're about evenly divided in terms
7 of what is necessary to constitute standing.

8 I put on the counsel tables two decisions from Judge
9 Coughenour that were issued in the last week. I believe
10 plaintiff's counsel in Bassett was involved in one of the
11 cases, and I'm not sure whether one of the defendants was also
12 involved. I don't put that out there as what should be the
13 law, or that the Court has made a decision, but only because
14 they were issued within the last few days. I wanted everyone
15 to have the benefit of those decisions.

16 What I'd like to do this morning is first hear argument in
17 the Bassett case. And I'm going to suggest 15 minutes a side.
18 Then we'll proceed, and I'd like to hear argument in the other
19 two cases together, because the other two cases essentially
20 deal with the application process in connection with getting a
21 job, and whether or not the Fair Credit Reporting Act, which
22 requires disclosures be made in a document solely for the --
23 consisting solely of the disclosure -- same issue really --
24 constitutes a violation of the Fair Credit Reporting Act.
25 Because the issue is essentially the same, the facts are a

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1 little different -- but what I'd like, and propose, is that the
2 defendants, the moving parties, go first, and that each
3 defendant counsel have ten minutes. And then we'll allow the
4 plaintiff to have a total of 20 minutes in rebuttal, or in
5 response to the motions.

6 So if you're ready to proceed, let's proceed with the
7 Bassett argument.

8 MR. LORBER: Good morning again, Your Honor. Abraham
9 Lorber, of Lane Powell, for the defendant in the Bassett case,
10 ABM Parking Services.

11 This is our motion to dismiss pursuant to FRCP 12(b) (6).
12 And in our motion, we have multiple bases for dismissal. But
13 pursuant to the Court's order and comments this morning, I'm
14 going to confine my remarks to Article III standing.

15 THE COURT: Well, Judge Coughenour did address the
16 issue that was raised in one of the cases dealing with whether
17 this is a 12(b) (6) motion or a 12(b) (1) motion. And basically,
18 he said the same standard applies. I think I agree with that.
19 So unless lawyers have a different view, don't spend much time
20 on the nature of the motion, but rather what is standing under
21 Spokeo.

22 MR. LORBER: Thank you, Your Honor.

23 So as the Court is aware, standing has three elements.
24 The element at issue here is the first element, which is injury
25 in fact. And the plaintiff, at the Rule 12 stage, bears the

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1 burden of alleging facts sufficient to support a finding that
2 there's an injury in fact.

3 To constitute an injury in fact, under *Spokeo* and prior
4 cases by the Supreme Court, there needs to be a concrete and
5 particularized harm that is actual and imminent, but not
6 conjectural or hypothetical.

7 Here, we do not dispute that Mr. Bassett has alleged a
8 particularized harm. It was his credit card receipt that was
9 printed. However, we most vigorously dispute the concreteness
10 element. And because Mr. Bassett has not alleged facts that
11 support a concrete injury, his injury is hypothetical and
12 conjectural, and is legally deficient.

13 THE COURT: What did Bassett allege is his injury in
14 the Complaint?

15 MR. LORBER: So it's very sparse, Your Honor. It's a
16 bare-faced pleading that he received the receipt that contained
17 the expiration date, and that he was harmed thereby. There's
18 some other allegation that is give us the date and time that he
19 received the receipt. But as far as injury is concerned, he
20 received the receipt with an expiration date and was harmed
21 thereby.

22 THE COURT: Well, let me read you specifically what
23 Bassett alleged. Paragraph 113 of the Complaint alleges that
24 it caused -- as a result of this receipt, causing an imminent
25 risk that plaintiff's valuable property would be stolen and/or

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1 misused by identity theft, or thieves. I think that's
2 basically the allegation.

3 How does that compare to the allegation contained in the
4 *Byles* case decided by Judge Coughenour recently?

5 MR. LORBER: Well, Your Honor, both the *Byles* case
6 and our case here were filed by my colleagues. And our
7 understanding is that the Complaints are functionally
8 identical. Both involve a pay-for-parking garage, located here
9 in the metro Seattle area, and both involve the printing of a
10 receipt with only a credit card expiration date. Those are the
11 allegations that we have.

12 Understood, the allegations the Court references in
13 Paragraph 113, but we would submit that that simply restates
14 the harm that the statute is trying to protect against, and
15 does not provide case -- any case-specific allegations that
16 would support a finding of concreteness.

17 THE COURT: Well, didn't Congress say that if you
18 violate this statute, you have a claim, you have a cause of
19 action? Isn't that the end of the story?

20 MR. LORBER: It is not, Your Honor. And it's not,
21 for a separation-of-powers reason.

22 As the Court explained in *Spokeo*, Congress has the right
23 to create a cause of action where none existed before. In this
24 context, it may be that before the FACTA, a plaintiff who did
25 suffer identity theft, by virtue of their credit card

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1 information being published, would not have a cause of action,
2 because there was no case law to support it.

3 But what the Court makes clear in *Spokeo* is that Congress
4 cannot usurp the Court's jurisdiction as far as it relates to
5 Article III. Congress cannot satisfy the Article III minimum
6 simply by passing a law. They can create a new cause of
7 action, as they did with FACTA, but they can't say a harm
8 exists where none existed before. And so even with Congress's
9 passing of FACTA, it's incumbent upon a plaintiff, such as
10 Mr. Bassett, to allege, at the Rule 12 stage, a concrete
11 injury.

12 The reason he did not allege a concrete injury -- there's
13 two reasons. The first is the issue of disclosure. The way
14 that this statute works, it's fairly obvious that this statute
15 is designed to prevent the unauthorized disclosure of credit
16 card information. And in this case, although we have a quite
17 lengthy complaint that deals a lot with the statutory history
18 of FACTA, we don't have any information that the credit card
19 receipt, with its information, was actually disclosed. All we
20 have is that the receipt was printed. And the implication, at
21 least from the Complaint, is that Mr. Bassett kept the receipt
22 until he handed it over to his attorneys. In keeping the
23 receipt, Mr. Bassett would have been in possession of the
24 information that the receipt retained, just like he would be in
25 possession of his credit card in his wallet, that contains all

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1 of the information for a credit card. And so without actual
2 disclosure of the information, the harm that FACTA is designed
3 to prevent never manifests itself. And so that is the primary
4 basis for dismissal that's argued in our motion.

5 After we filed our motion, we had the benefit of Judge
6 Coughenour's rulings in the *Byles* and *Israel* case. And in
7 those cases, what Judge --

8 THE COURT: Hold your voice down a little bit. The
9 microphone system works really well.

10 MR. LORBER: Thank you, Your Honor.

11 In both of those cases, Judge Coughenour explained that
12 even if there was disclosure of the sort of information that's
13 at issue here, it could not create a risk of harm. And Judge
14 Coughenour goes through the congressional findings, and the
15 history of FACTA, and the pronouncements regarding the
16 potential harm, and found that even if a hacker or identity
17 thief had possession of Mr. Bassett's receipt with its
18 expiration date, they would not be able to steal his identity.

19 THE COURT: All right. Well, I understand you like
20 Judge Coughenour's decision. It seems fairly close to the
21 facts here. But let's leave Judge Coughenour's rulings.

22 Haven't two circuits essentially said there would be
23 standing under these kinds of facts? Haven't at least 10 or 12
24 district courts said there would be standing under these kinds
25 of facts?

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MR. LORBER: Well, Your Honor, I'm not -- so I have the FACTA cases that we've cited and that the plaintiffs have cited. And none of those FACTA cases that we've had the opportunity to review -- FACTA cases, that is -- deal with these particular facts. And I'd like to distinguish this case from the *Wood vs. Jimmy Choo* decision that the plaintiffs cited in their supplement authority.

So in *Wood vs. Jimmy Choo*, the plaintiff received a receipt that contained the expiration date in addition to a host of additional identifying information, such as name and address, that is not alleged in this case. Additionally, in the *Wood vs. Jimmy Choo* case, the disclosure of the receipt occurred in what we refer to in our brief as sort of the classic point-of-sale situation, which is, it was at a Sunglass Hut in a shopping mall. So in those situations, there's two receipts, traditionally. There's one for the plaintiff, and there's one that's retained by the merchant, that has the information on it. And so --

THE COURT: Doesn't -- when I go to the parking garage and get my receipt, doesn't the parking company have a record of the same receipt?

MR. LORBER: The parking company -- Your Honor, that information is not in this record. And I can answer that if there's additional -- the record is supplemented at some later point in the case, it will be clear that that is not the case

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1 in this parking garage. But since this is a Rule 12 motion,
2 and we have to use the allegations in the Complaint, all we had
3 is that one receipt was printed. There's no allegation of a
4 second receipt that was retained by anyone other than
5 Mr. Bassett or his attorneys.

6 And so Your Honor, I would focus on the FACTA cases that
7 have come out since *Spokeo*. We have Judge Coughenour, in *Byles*
8 and *Israel*. We also have the *Wood* case. We would submit that
9 the *Wood* case is distinguishable. Judge Coughenour -- and I
10 know you don't want me to rely on Judge Coughenour too much,
11 but he did thoroughly distinguish the *Wood* case in his decision
12 on *Byles*.

13 And the specific factual scenario, we would submit, is
14 what's important here. There is no allegation of the second
15 receipt. There is no allegation, as is discussed in the
16 *Andrade* and *Shlahtichman* cases that are also cited by the
17 plaintiff, of the receipt being mislaid, or copied, or someone
18 looking over the plaintiff's shoulder. That could happen.
19 We're not saying that that's impossible, that there could never
20 be a violation. What we're saying is that in this case, given
21 the stage that we're at, the plaintiff bears the burden of
22 alleging some sort of disclosure of this receipt to a third
23 party. And the Complaint, for all its length, is devoid of any
24 such allegation.

25 THE COURT: Well, if I were to proceed along the

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1 lines you argue, would the dismissal have to be without
2 prejudice and with leave to amend?

3 MR. LORBER: So obviously, we would prefer dismissal
4 with prejudice.

5 THE COURT: I know what you'd prefer but --

6 MR. LORBER: Given our alternative requests in our
7 motion for a more definite statement, and Judge Coughenour's
8 decisions in *Byles* and *Israel* where he dismissed without
9 prejudice, we would anticipate that if the Court agreed with
10 us, it would also dismiss without prejudice. We strongly
11 suspect that if the plaintiffs were to then file an amended
12 complaint, it would be similarly deficient, because there
13 simply was no disclosure. But we certainly understand that at
14 least the trend in this district appears to be dismissal of
15 these cases without prejudice.

16 THE COURT: Well, at least the trend in Judge
17 Coughenour's court.

18 MR. LORBER: Yes, Your Honor.

19 Unless the Court has any further questions, that pretty
20 much sums up our argument. To repeat, there was no disclosure
21 of this information to any third party; and thus, the potential
22 harm never manifested. And even if there was disclosure, the
23 information that was disclosed cannot lead to identity theft,
24 as explained by Judge Coughenour in the *Byles* and *Israel* cases.

25 Thank you.

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1 THE COURT: Thank you.

2 MR. LOVE: Good morning, again. May it please the
3 Court, Chris Love, of Pfau Cochran Vertetis Amala, here on
4 behalf of Plaintiff Steven Bassett.

5 Keeping the Court's remarks in mind about the standard of
6 review on the motion, I'll be brief. Our only real dispute is
7 whether the *Iqbal/Twombly* plausibility standard applies in this
8 case. As the Ninth Circuit stated in the *Maya* case, that
9 standard, that portion of the 12(b)(6) standard, is
10 inappropriate for a motion to dismiss premised on standing,
11 because it involves consideration of the merits of the case.
12 As the Ninth Circuit said in *Maya*, the question of standing
13 precedes and does not require analysis of the merits.
14 Otherwise, we do agree that --

15 THE COURT: Judge Coughenour did deal with that very
16 argument in Footnote 1; did he not?

17 MR. LOVE: He did state that some of the 12(b)(6)
18 standard applies, taking all allegations as true and construing
19 all inferences in the manner most favorable to plaintiffs. And
20 we don't dispute that, Your Honor. We agree with that portion.
21 To the extent that Judge Coughenour's opinion was based on
22 application of the plausibility standard, we object to that.

23 Regarding the substance of the case, Plaintiff Bassett's
24 standing to sue, we obviously disagree with the defendants on
25 what the Supreme Court stated in *Spokeo*. There was really no

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1 new ground broken there. It was merely a reaffirmation of
2 longstanding principles regarding standing. The *Spokeo* court
3 reaffirmed that Congress does have the power to identify and
4 elevate injuries and harms to a legally cognizable status.
5 They reaffirmed that Congress is well-positioned, direct quote
6 from the case, "to identify especially intangible harms and to
7 identify and articulate chains of causation that lead to those
8 harms."

9 *Spokeo* expressly instructs courts to defer to
10 congressional judgment, is important and instructive, drawing
11 on past Supreme Court precedent, such as the *City of Boerne*
12 case. Congressional findings of harm such as this are entitled
13 to substantial deference, because Congress's function within
14 our system of government is to perform these extensive
15 fact-finding processes that a court simply can't perform.

16 THE COURT: Well, did *Spokeo* court indicate that a
17 procedural violation alone might or might not be -- provide
18 standing? I mean, they indicated that there would be some
19 procedural violations where no standing would occur and more
20 concrete injury is necessary.

21 Do you agree with that?

22 MR. LOVE: We do, Your Honor.

23 THE COURT: And your allegation -- I referred earlier
24 to Paragraph 113. If there's other allegations in your
25 Complaint you wish me to look at, I will. But you alleged that

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1 the fact that there was an expired -- there was an expiration
2 date on the receipt itself caused imminent risk that
3 plaintiff's valuable property would be stolen and/or misused by
4 identity thieves. I believe that's your language. That's just
5 a pure possibility that this violation might cause that damage
6 in the future.

7 Is that kind of where you are?

8 MR. LOVE: And I believe Your Honor properly
9 characterizes it. The harm we are alleging is that printing an
10 expiration date on a receipt causes this risk of identity
11 theft. And that is the precise risk that Congress sought to
12 address through FACTA's truncation requirements. The
13 congressional record is replete with references, over and over,
14 saying that the purpose of these truncation requirements is to
15 limit opportunities -- not to limit actual disclosures, the
16 defendants claim -- but to limit opportunities for sensitive
17 card information to be picked off by identity thieves.

18 THE COURT: But what's the difference between that
19 and the zip code, that the Supreme Court in *Spokeo* suggested
20 would not be -- give rise to standing?

21 MR. LOVE: In our view, Your Honor, before FACTA was
22 enacted, Congress had extensive hearings on the explosive
23 growth of identity theft, its causes, the numbers, millions of
24 consumers affected, and ways to stem the tide of this growing
25 crime. And within this specific congressional record, based on

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1 those facts, Congress identified that there was a real risk of
2 harm. A direct quote from --

3 THE COURT: There's no question that Congress
4 identified the real risk. The question is whether you have
5 alleged the concrete injury under *Spokeo*.

6 Tell me, do you have any circuit or district court
7 decisions in *Spokeo* that would favor your position today?

8 MR. LOVE: Post-*Spokeo*, we are not aware of a case.
9 I would, however, point to *Spokeo* itself, where the Supreme
10 Court reaffirmed, again, a direct quote, "that a real risk of
11 harm is sufficient to constitute a concrete injury in fact."
12 And that is what Congress recognized in enacting the truncation
13 requirements. There is a real risk of harm.

14 THE COURT: Let me ask you this. If given an
15 opportunity to amend, do you know of any facts that would allow
16 you to provide us with any other injury alleged to have
17 occurred for your plaintiff in Bassett?

18 MR. LOVE: Your Honor, I believe the injury would be
19 confined to the printing of the expiration date.

20 We do allege on our complaint that Plaintiff Bassett
21 received this receipt from a kiosk near the elevators in the
22 building he was in. And this creates an additional opportunity
23 for what's called in the security circles "shoulder surfing,"
24 where someone standing behind the plaintiff could potentially
25 see the receipt and pick off information from it.

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1 THE COURT: Do you know of any facts in your case
2 that would allow you, given Rule 11, to allege any additional
3 injury, other than what you've alleged?

4 MR. LOVE: Not on current investigation, Your Honor.

5 THE COURT: So if I were to grant the motion to
6 dismiss, would it be with prejudice?

7 MR. LOVE: Unfortunately, I would have to agree with
8 Your Honor. Our position is that the risk of harm created in
9 printing the expiration date on the receipt is sufficiently
10 concrete.

11 THE COURT: All right. I think I understand your
12 position. Thank you.

13 I'm -- unless you've got further arguments, I mean --

14 MR. LOVE: Just simply, I want to direct the Court's
15 attention to the *Wood* opinion, which was provided in the notice
16 of additional authority. Defense counsel also addresses the --
17 Judge Coughenour.

18 The attempt to distinguish the *Wood* opinion on its facts
19 is simply unavailing. The *Wood* court did not rely on those
20 additional facts in reaching its opinion. It relied simply on
21 the fact that an expiration date was printed on the receipt.
22 That was the key fact in that analysis. In fact, it was the
23 only fact on which that analysis hinged.

24 THE COURT: Well, but the Court -- I have the opinion
25 right here. It does say in the facts that *Wood* alleges that

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1 *Jimmy Choo* willfully violated FACTA by issuing a sales receipt
2 with the expiration date. The receipt also contained other
3 sensitive information about plaintiff, including her home
4 address, telephone number, and name of the salesperson that
5 conducted the transaction. And then it also had the last four
6 digits of the credit card, which is permitted. As a
7 consequence, the claim -- the complaint claims that each class
8 member has been burdened with an elevated risk of identity
9 theft.

10 Now, that's a little different -- those facts are a little
11 different than your facts; aren't they?

12 MR. LOVE: We do acknowledge that, Your Honor, but
13 our position is that it's a distinction without a difference.
14 Because when you proceed to the analysis of standing in the
15 *Wood* opinion, those additional items that are on the receipt
16 aren't mentioned. The only fact that's mentioned is that that
17 expiration date was printed on the receipt.

18 THE COURT: You know, the *Wood* case also makes a leap
19 of faith which I think the Eleventh Circuit has made, and that
20 is that this is a substantive violation, as opposed to a
21 procedural violation. Because the *Wood* court states that
22 through FACTA, Congress created a substantive legal right for
23 *Wood*, and other card-holding consumers, to have their receipts
24 truncated with just specific information.

25 Once you have a substantive right, if it is a substantive

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1 right, then that's a little different. I think maybe it's only
2 the Eleventh Circuit that has described, in a different
3 context, this as being a substantive right.

4 If this is a substantive right, your claim, then, isn't
5 any -- any violation of FACTA a substantive right?

6 MR. LOVE: As far as the truncation requirements go,
7 we would agree, Your Honor. But that is premised on the fact
8 that it's not simply a situation where Congress has created a
9 statute saying, "Don't do this," and there are no congressional
10 findings, no congressional exploration of an underlying harm.
11 An example would be if Congress created a statute stating, "No
12 commercial mailers shall be sent to consumers, that use the
13 color orange." There can't be any conceivable harm there.
14 There would be no congressional findings that there was any
15 harm that motivated enactment of that statute, a harm that was
16 being elevated to a legally cognizable status.

17 FACTA is completely different. The record is clear that
18 there were extensive hearings on the problem of identity theft.
19 And ultimately, the truncation requirements, this substantive
20 right, as the *Wood* court in the Eleventh Circuit found, weren't
21 the solution to that harm.

22 THE COURT: All right. I think I understand your
23 position. Unfortunately for you, I don't agree with it. I am
24 going to grant the motion to dismiss in Bassett. I believe
25 that the -- you can sit down. I'm not going to issue a formal

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1 order, other than what I say here today. But basically, the
2 harm that is alleged here is strictly a procedural violation of
3 the statute where -- nothing more than a potential risk of some
4 harm in the future. As I indicated, the complaint only alleges
5 risk that plaintiff's rights, or property rights, would be
6 stolen, nothing more.

7 The case is almost identical to the ruling by Judge
8 Coughenour in *Byles vs, Ace Parking Management*, Docket
9 Number 24, filed in case Number 16-0834. Judge Coughenour also
10 had a second case, which was filed two days ago, on the same
11 precise issue and -- in *Israel vs. Diamond Parking Services*,
12 Docket Number 23. Again, the reasoning is the same.

13 *Spokeo*, for all its uncertainty in terms of what it means,
14 because the circuit courts and the district courts have, in
15 other contexts -- we're going to get to that in a few
16 minutes -- have struggled with exactly what constitutes some
17 sort of concrete injury necessary to have Article III standing.
18 But I think it is clear that *Spokeo* said that not every
19 procedural violation gives rise to standing. Something more is
20 necessary.

21 Plaintiff has failed to articulate, in the pleadings here
22 in Bassett, anything more than a pure possible violation, or
23 possible risk of theft. And I'm satisfied that under those
24 circumstances, the Court must, and does, dismiss, and, I
25 believe, with prejudice. I appreciate counsel's candid remarks

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1 with respect to what he could or could not allege. I think
2 he's alleged everything that he believes is appropriate. Given
3 those circumstances, the dismissal must be with prejudice.
4 We'll enter a judgment accordingly in the next day or two.

5 I thank the lawyers for their participation in the hearing
6 connected with that issue in Bassett, and we'll now -- those
7 lawyers are free to leave, if you'd like. It's always good to
8 leave when you win, and even when you lose. You're welcome to
9 stay or leave, as you wish, Counsel.

10 It's an interesting issue. But I think this particular
11 issue is fairly clear, and I have no reluctance to rule from
12 the bench, as I have done.

13 So thank you for your arguments and your briefs, and
14 you're excused, if you wish.

15 MR. LORBER: Thank you, Your Honor.

16 MR. LOVE: Thank you, Your Honor.

17 THE COURT: Well, let's proceed with the next
18 arguments.

19 There's a similarity here, and I know that the defense
20 counsel is different in the Connolly and Dougherty cases.
21 Plaintiff's counsel is the same. So what I've suggested is not
22 more than 20 minutes. And hopefully, you can divide up your
23 time. But the issues are essentially similar in these two
24 cases, but different from the case that we've just heard
25 argument on.

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1 So go ahead, Counsel.

2 MR. HOWARD: Thank you, Your Honor. Jim Howard, on
3 behalf of Defendant Umpqua Bank, Case 2:15-cv-00517.

4 Your Honor, I think the Court is right to refer to *Spokeo*.
5 And I'd like to at least start there, briefly, because I think
6 it gives us some context to what we're all here talking about
7 and what the courts across the country are wrestling with.

8 I think what's helpful for our argument is, *Spokeo* was an
9 FCRA case, so it involved an entity that the Court presumed was
10 a consumer reporting agency. They aggregated information on a
11 website. Some of it was displayed. If you go to the website
12 and type in someone's name --

13 THE COURT: Well, what's happened to *Spokeo*? I know
14 the Ninth Circuit got it back, but what has happened, if you
15 know?

16 MR. HOWARD: I do know, because I checked, Your
17 Honor. I had the same question myself. It is set for argument
18 in December, so we may have further guidance on how the Ninth
19 Circuit decides to deal with *Spokeo* at that time. But I don't
20 know how long it will take before an opinion might then be
21 issued. So it could be some time.

22 Obviously, in the meantime, district courts have to
23 wrestle with, well, what do you do?

24 THE COURT: Well, and they've been pretty much
25 divided; haven't they? I mean, the plaintiff relies heavily on

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1 the *Thomas* decision, which is a very thoughtful district court
2 opinion.

3 What do you think about that opinion?

4 MR. HOWARD: Your Honor, I think that *Thomas* is a
5 different case, and also that *Thomas* makes some mistakes in the
6 analysis on how it goes about analyzing the issues.

7 I think probably it's important to realize that *Thomas* had
8 already had a summary judgment motion that was denied; then
9 there was a class certification motion, which was granted. And
10 the case was very far along, then, at the point in time when
11 this *Spokeo* issue arose.

12 The Court then is faced with deciding what to do with a
13 case that all the parties and the Court itself had put a lot of
14 resources into. I think sometimes that influences the
15 analysis. But it was -- it's a fairly long opinion. But where
16 the Court, I feel like, goes wrong is at two points. Or maybe
17 I should say it this way: There's two reasons why I don't
18 think it governs the outcome in this case.

19 One is, it was a different scenario. There were
20 allegations in that case that the actual, kind of, core purpose
21 of the statute had been violated; in other words, that the
22 individual at issue had been denied employment because of an
23 essentially secret background check that had been run; that he
24 didn't know anything about that until after the fact; and that
25 there were quite a number of errors in that report. That's a

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1 very different situation than a purely procedural error, if you
2 will, where there is a quibble about some particular
3 requirement the statute has that maybe wasn't followed
4 procedurally.

5 THE COURT: Well, it's not a quibble. The statute
6 says you do it one way, with a sole document, and they didn't
7 do it that way. They had a release in the same document; did
8 they not? It's clearly at least a procedural violation; do you
9 agree?

10 MR. HOWARD: Agreed there, Your Honor.

11 THE COURT: All right. And this was what Congress
12 was attempting to eliminate by passing these laws.

13 Why isn't this a violation that rises to the level of
14 Article III standing?

15 MR. LOVE: Your Honor, I would say, first of all --
16 I'm not sure I can get rid of the yellow markings.

17 THE COURT: So why don't you take just a moment and
18 just capsulize the facts here that give rise to this claim.

19 MR. HOWARD: I will, Your Honor.

20 What we have here, Congress -- if you look at the
21 congressional history, the purpose of passing the FCRA was,
22 there was a concern that -- there was a growing amount of data
23 out there about counterfeiting. And that data was accessible
24 to companies and other -- really anyone that wanted to run a
25 background check on someone. And so the law was passed to make

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1 sure that people had notice that that was taking place, and an
2 opportunity then, if the report was issued, to request a copy
3 of it.

4 All those things that the statutes intended to address,
5 are indisputably satisfied here. This is the form that was
6 used. It says, "Disclosure and Authorization Regarding
7 Procurement of Background Reports," in caps, at the top of the
8 form. Umpqua Bank, due to the regulations it operates under,
9 has to run background checks on anybody that it hires at the
10 bank. This is a requirement under federal law, under the FDIC
11 Act, and the SAFE Act, as well. So they don't have a choice.
12 They have to run a background check on everybody, if they're
13 going to consider employing them at the bank, because of the
14 sensitive nature of working at a bank.

15 There's no dispute, that plaintiff has raised, that she
16 got the form. There's no dispute that she didn't understand
17 the form. She hasn't raised any allegations that she was
18 somehow tricked, that this isn't her signature, that she didn't
19 understand it was a background check. It's apparent, if you
20 look at the form itself, that that's exactly what's going on,
21 "In connection with my application for employment," et cetera,
22 et cetera, et cetera, there's going to be this background
23 check, signature at the bottom.

24 And then one of the issues that plaintiff is raising is
25 that on the form itself -- and it's a one-page form -- there's

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1 also these boxes where plaintiff then had to handwrite in the
2 information that would be required to actually run that
3 background check. Okay. Well, what's your name, your address,
4 your driver's license, so we can run that information?

5 Now, you could dispute -- and there is an argument that
6 the Court's seen -- as to whether that's itself compliant or
7 not compliant. But that's not an issue for us to solve today.
8 What is an issue for us to solve today is whether there's been
9 any concrete injury that's alleged as a result of the claimed
10 extra language that's in the form. Now, I think by having to
11 handwrite in that information right below, it's actually even
12 doubly clear that you're having a background check. That's why
13 you put that information in there by hand.

14 Where plaintiff has a problem is that then in the
15 complaint, after submitting this, plaintiff says only that
16 there was a statutory violation. Plaintiff says -- and I'm
17 looking at Paragraph 44 and 45 as an example -- by including
18 additional language, questions, blanks, and disclaimers, in
19 this form right here, Umpqua violated the statute. Umpqua's
20 disclosure and form was not clear and conspicuous, and did not
21 consist solely of the disclosure that a consumer report may be
22 obtained for employment purposes, and that this violated the
23 statute. And therefore, plaintiff is entitled to statutory
24 damages. That's not sufficient. That's just repeating the
25 statutory language. And that's actually -- if you look closely

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1 at what *Spokeo* did, that's the same conclusion that *Spokeo*
2 draws.

3 So *Spokeo* also dealt with FCRA provisions. And the
4 plaintiff in that case had alleged that there was problems with
5 the notice that was supplied; that under the different
6 provisions that were cited in that case, that a certification
7 had not been obtained; that the purchaser of the background
8 report was complying with all of these notice requirements; and
9 that a copy of the rights of the consumer was not included
10 along with the background report when it was generated, et
11 cetera. These are the same types of notice type of procedural
12 provisions.

13 THE COURT: Well, the *Thomas* court said, in facts
14 very similar, the rights created by Section 1681b(b)(2) are
15 substantive rights, and the breach of the statute is not a bare
16 procedural violation. That was the first reason given for
17 essentially ruling denying the motion to dismiss.

18 And how do you respond to that?

19 MR. HOWARD: So Your Honor, I think that's where the
20 *Thomas* court decided to take a shortcut, to be honest, and
21 said, "We're going to call these substantive."

22 THE COURT: And once you get into the substantive
23 area, you would agree that it would -- if I concluded that it
24 was a substantive violation, then I'd have to deny your motion
25 to dismiss; would you agree with that?

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MR. HOWARD: Your Honor, actually, I wouldn't. Because I think, to be honest, that it's a somewhat artificial distinction. I think you could argue something is procedural, substantive, and some combination, potentially. I think what --

THE COURT: Hasn't the Eleventh Circuit kind of come out and said these are substantive violations?

MR. HOWARD: I think somewhat, although --

THE COURT: Well, what do you mean "somewhat"? They actually so held; have they not?

MR. HOWARD: Your Honor, I don't think they've said exactly that in an FCRA case like the kind we have, where there's just a statutory allegation at stake. But the Eleventh Circuit -- I think it's in the *Ascenda* case --

THE COURT: In the *Church* case.

MR. HOWARD: *Church case*, yes -- does go that direction. That's a little different, though. That case involved a notice to consumers that basically collection efforts were going to commence immediately, so that there's a negative effect that's happening to the consumer right away, and that the rights and the things the consumer could do to stop that weren't included along with it.

So you often get into the facts. And I think they're important, because really it isn't so much a substantive procedural distinction. That's not what, I don't think, Spokeo

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1 really directs. What *Spokeo* says is, we have Article III. And
2 what does Article III say? Article III says you have to have
3 an injury to be in federal court. And what we've said in the
4 case law is, it has to be a concrete injury. That's the test.

5 Now --

6 THE COURT: But *Spokeo* also said that the injury need
7 not be tangible to be concrete; did it not?

8 MR. HOWARD: Right. It did say that. And the
9 example the Court used was, well, you know, we do have certain
10 cases where, for example, there's this diffuse harm, and
11 Congress has passed a law -- and the example the Court uses is,
12 "You may be entitled to some information." Congress has said
13 you can get this information. The government refuses to give
14 it to you. What are you supposed to do? Well, you don't know
15 if you've been harmed by not receiving that information,
16 because you don't have it. The only way to actually know if
17 you have an injury is to get it. And so in that -- and that's
18 what the Court said. You know, yes, that's a scenario where
19 that's part of what Congress was setting up. It's part of that
20 unusual situation where, you know, we're going to allow that to
21 proceed in this way --

22 THE COURT: How do you -- the *Church* court relies on
23 the *Havens* case, dealing with these fair housing testers that
24 go out and apply to rent some property. They're not really
25 intending to rent. They want to see whether they're going to

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1 rent to them or not, because they're African-American or
2 whatever, and then the next person comes along and gets the
3 property.

4 And the question there in *Havens* was, was that a
5 violation? Did they have standing, those white tester
6 plaintiffs, if you will? And *Havens*, which is a Supreme Court
7 case said, yes, they had standing, even though they never
8 intended to rent the property.

9 How do you -- and the Court in *Havens* explained that the
10 fact that the tester never intended to rent does not negate the
11 simple fact that there was injury under the Fair Housing Act,
12 and they had standing. What's different here?

13 MR. HOWARD: Your Honor, I think what's different is
14 what the Supreme Court says in *Spokeo* is, you've got to look at
15 the history of whether we've allowed a type of claim in this
16 setting. And you also have to look at what is the
17 congressional purpose itself that's being set forth here. And
18 that's what Judge Coughenour does a nice job of in the *Byles*
19 case is --

20 THE COURT: You like Judge Coughenour's case, as
21 well?

22 MR. HOWARD: I do, Your Honor, I have to admit.

23 But he does a good job of taking that and applying that in
24 context. And I think it's important. Because if you look in
25 *Spokeo*, it's dealing with these exact type of FCRA provisions.

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1 And the Court says, in the context of this particular case, the
2 general principles that we've told you about, tell us two
3 things. On the one hand, Congress plainly sought to curb the
4 dissemination of false information by adopting procedures
5 designed to decrease that risk. On the other hand, *Robins*
6 cannot satisfy Article III by alleging a bare procedural
7 violation. A violation of one of the FCRA's procedural
8 requirements may result in no harm. For example, even if a
9 consumer reporting agency fails to provide the required notice
10 to a user of the agency's consumer information, that
11 information, regardless, may be entirely accurate --

12 THE COURT: I've read *Spokeo*. You don't need to read
13 it to me.

14 MR. HOWARD: Sorry, Your Honor.

15 THE COURT: And your time is essentially up. I've
16 used much of it, I suppose, in asking questions. But I think
17 your counsel in the other case wishes to be heard, so why don't
18 you wrap up what your position is.

19 MR. HOWARD: Your Honor, if I can just wrap up, then,
20 I will. And I apologize for reading the -- part of the opinion
21 to the Court. I just thought that piece of it really answers
22 the question for us in this case, I think.

23 THE COURT: Well, you know that you can read *Spokeo*
24 for a long time, and it raises as many questions as it answers.
25 That's why the circuits are split, the district courts are

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1 split. There's a lot of uncertainty about what it means.

2 MR. HOWARD: I think there's some uncertainty about
3 what it means, but we know what it did with an FCRA claim that
4 included, if anything, more allegations of harm than we have
5 here. It said, "You haven't connected the dots. It's not
6 concrete enough. We're sending this back to the Ninth
7 Circuit."

8 THE COURT: Well, it sent it back to the Ninth
9 Circuit, but we don't know what the circuit's going to do; do
10 we? I mean, it's possible that they're going to conclude
11 because the circuit -- as I understand it, when it first was
12 decided, they didn't concentrate on the second part of the --
13 what's a concrete injury. So they may well decide that there
14 is a concrete injury there.

15 MR. HOWARD: Your Honor, it's possible, although I
16 think the Ninth Circuit has already kind of raised the issue in
17 one of its cases, where it was talking about -- I think it was
18 a RESPA case. But it said, well, under *Spokeo*, just not
19 getting sufficient notice, there's a good chance that that
20 isn't sufficient. That's the *McQuinn vs. Bank of America* case.
21 It says the holding in *Spokeo* calls into question whether
22 a violation of -- actually, the Truth in Lending Act's notice
23 requirement, without more, creates an injury that is
24 sufficiently concrete to confer standing. That's the only
25 guidance I have from the Ninth Circuit that I can point the

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1 Court to.

2 But I will say the Court has some, I think, good guidance
3 from the *Larroque* case, out of the Northern District of
4 California, and the recent *Nokchan vs. Lyft* case, which really
5 are on all fours with this scenario. There's just purely an
6 allegation of a procedural violation, that somehow the
7 disclosure form itself included extra information. And those
8 courts distinguished *Thomas* more or less along the lines that I
9 talked about, and said, "No. Those are dismissed. You haven't
10 done the concrete link."

11 I think it's potentially different from the parking case
12 you just had in that I don't know what else plaintiff can say.
13 I'm not sure how the dismissal should proceed, whether it
14 should be with prejudice or without. But what we have --

15 THE COURT: All right. Mr. Howard, I think your time
16 is up.

17 MR. HOWARD: Thank you, Your Honor.

18 THE COURT: You've got a very impatient colleague
19 over there that wants to talk about the other case.

20 MR. VANCE: Thank you, Your Honor. Joseph Vance, on
21 behalf of Defendant BBSI.

22 While everyone acknowledges that *Spokeo* leaves some
23 questions unanswered, there are some questions that are
24 answered. I mean, it gave the example. Not every violation of
25 FCRA creates a concrete harm. And it gave an example of that.

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1 Failure to give notice where the agency -- nonetheless, the
2 information that was provided was entirely accurate, the
3 Supreme Court says there's no concrete harm there.

4 And so in this case here -- so the idea that the notice
5 that was required to be provided by a reporting agency, the
6 Supreme Court itself says that's a procedural violation.

7 THE COURT: Take a moment to focus on the precise
8 facts here and how it may be different or the same.

9 MR. VANCE: Yeah. So the precise facts here are that
10 the disclosure had additional information, including
11 information regarding a release of liability, including
12 additional information regarding other authorization to provide
13 other information. But it's also undisputed that the very
14 first sentence of the disclosure authorizes BBSI to obtain a
15 consumer report for employment purposes.

16 And what's significant here is that it's undisputed --
17 there's not a single allegation that the plaintiff didn't
18 understand that the plaintiff was authorizing a consumer report
19 for employment purposes. There's no allegation that the
20 consumer -- that the plaintiff did not sign the authorization.
21 There's no allegation by the plaintiff that if, in fact, the
22 form was as the plaintiff alleges that the form should have
23 been, that the plaintiff would not have signed the form.

24 THE COURT: Well, so in this case, the authorization
25 form, wasn't it broader than was necessary? I mean, it's

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1 alleged that the release authorized the defendant to -- the
2 ability to obtain school records that might not otherwise have
3 been permitted.

4 MR. VANCE: That's the allegation. And if
5 anything --

6 THE COURT: Well, I have to assume that's true; don't
7 I?

8 MR. VANCE: Correct. But also, then, how was the
9 plaintiff injured or harmed by that? In other words, the fact
10 that that language was in there, if anything, that would cause
11 the plaintiff to be cautious about signing.

12 So in this case here, they -- that -- there's nothing
13 about that language that would have encouraged the plaintiff to
14 go ahead and sign the authorization. And that's the whole
15 point of the statute. The statute -- and again, this case
16 would be totally different if you had a plaintiff that says, "I
17 would not have signed this authorization if this had been in a
18 different form, format." That's not the allegation. The
19 allegation is simply, "I'm entitled to damage, because the
20 format was not correct." And that's what *Spokeo* says you're
21 not allowed to do. There's no Article III standing with
22 regards to that.

23 If I might, I know that most of our time is over --

24 THE COURT: I'm going to give you -- and I'll expand
25 the plaintiffs' time. But so -- take your time. I mean, it's

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1 not clear to me that these are identical kind of cases, but
2 they may be.

3 MR. VANCE: Frankly, Your Honor, I do think that
4 they're identical type of cases. I mean, the question is, the
5 fact that you have extraneous -- allegedly extra language, does
6 that create an injury, without showing some particular,
7 concrete harm?

8 I distinguish it from the *Church* case. I mean, I think
9 the *Church* case is substantially different. The *Church* case
10 contains a demand letter that's going out to potential debtors,
11 that does not include notice provision with regards to their
12 rights with regards to that. That's not the situation here.
13 And so I do think that there's a distinction in that.

14 The one --

15 THE COURT: Well, and the alleged injury here in this
16 complaint is -- I think the operable allegations are in
17 Paragraph 49, which says: Plaintiff experienced a concrete
18 injury. I'm going to paraphrase. She was deprived of a
19 disclosure to which she was statutorily entitled as a failure
20 to comply with the stand-alone disclosure requirement, and
21 defendant invaded her privacy by obtaining a consumer report on
22 her without making an appropriate disclosure and obtaining
23 proper authorization.

24 So I think the statutory failure itself may not be enough.
25 But address the second sentence which alleges that plaintiff's

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1 privacy was essentially invaded by obtaining a consumer report
2 without making the necessary disclosures.

3 MR. VANCE: I think both the recent *Lyft* case, from
4 the District Court in California, as well as the *Caremark/Wood*
5 [sic] case, or the *Wood/Caremark* [sic] case, in Missouri,
6 analyzed that issue. And the issue is, you don't have a lack
7 of privacy when you knew that you were -- when you knowingly
8 authorized the company to obtain a consumer report.

9 So in this case here, there isn't a lack of privacy.
10 Because even with -- even notwithstanding you didn't get the
11 notice that you claim that you were entitled to, you still knew
12 that BBSI was obtaining the report. And in fact, there's no
13 allegation that, "I wouldn't have authorized them to obtain the
14 report."

15 And so again, if this was a case where the disclosure
16 language was hidden someplace, or that the plaintiff was
17 confused about it, or if the plaintiff is saying, "I would
18 never have done it if I had known," that might be potentially a
19 privacy case. But there's no such allegation in this case with
20 regards to that. And both *Lyft*, *Caremark*, the *Ohio State* case,
21 *Smith vs. Ohio State*, all of those analyzed that and deal with
22 that.

23 Your Honor --

24 THE COURT: These *Ohio State* cases kind of dealt with
25 a public entity. I mean, is that a little different?

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MR. VANCE: I think they're potentially a little different, but I don't think it's different with regards to this issue. I mean, the issue with regards to this was the same issue in the sense that it was looking at -- it looked at those privacy cases, and I think it also looked at the informational arguments that were made.

THE COURT: If we were sitting in the Eleventh Circuit, would you lose your motion to dismiss, as a result of *Church*?

MR. VANCE: Yeah, I would hope that I would be able to convince the Eleventh Circuit that ours is distinguishable from that case, and particularly that I do not see any way that you can call -- if the United States Supreme Court says that failure to give notice to a user is a procedural violation, and it doesn't create any harm as long as the information is entirely accurate, then how is my case a substantive? How -- there's no way that the notice that's -- for sole disclosure is a substantive right and that what the -- *Spokeo* is talking about is a procedural right. If that's a procedural right, mine's a procedural right. And you need look at what the actual damage is.

THE COURT: Well, but some procedural rights can give rise to standing. You agree that *Spokeo* helped -- so helped.

MR. VANCE: Yeah, if you can show that you have
injury.

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1 So that's why I say in this case if you said, "I didn't
2 get the notice," or the notice was hidden, or it was buried, or
3 it was improper, and there was an allegation that, "I would not
4 have signed this if it had been given to me properly," or, "I
5 did not understand it," and that's why. They don't say that.
6 And that's what *Spokeo* at the very least is saying with regards
7 to these FCRA, is that if -- where notice is not given, tell me
8 what the damage is, tell me what the injury is.

9 THE COURT: If I were to agree with your position,
10 would I have to dismiss with leave to amend?

11 MR. VANCE: I suppose that if they could offer that,
12 there would be an opportunity for them to do that.

13 If I might, I wanted to -- there is one difference between
14 the BBSI and Umpqua that has to do with that issue of dismissal
15 versus remand. The plaintiff is arguing in our case, because
16 the case was removed from state court, that the proper issue --
17 the proper result would be a remand to state court. And we've
18 cited the cases that indicate that that's not correct.

19 I'll be honest with the Court --

20 THE COURT: But the standing -- the Article III
21 standing is an Article III federal court standing requirement.

22 Do the state cases suggest that their standing -- what's
23 necessary for standing would be different?

24 MR. VANCE: I believe that our argument would be that
25 in -- that Washington, although it's not bound by Article III,

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1 that they follow standing jurisprudence that's similar to the
2 standard for Article III, but the bigger --

3 THE COURT: Do you have a case that says precisely
4 that?

5 MR. VANCE: I have -- not off the top of my head can
6 I cite to it. We have cases that would indicate that.

7 THE COURT: Did your brief contain those cases?

8 MR. VANCE: I don't know that we cited to those
9 cases, Your Honor.

10 My -- the point that I would make with regards to that,
11 though, is this issue that in this case here, the only case at
12 issue -- the only claim at issue is a claim on a federal
13 statute. The -- a defendant is entitled to have a claim on
14 federal statute decided in federal court. And if the result of
15 this is that where a plaintiff does not have a concrete harm,
16 they're nonetheless entitled to pursue that in state court,
17 what it would mean is that a defendant now, notwithstanding
18 that the only claim that's at issue is a federal claim, a
19 federal statute, they would have to defend that case in state
20 court. So they wouldn't have to defend the case in state court
21 where the plaintiff has actually been injured and has a
22 concrete injury. They would only have to defend the case in
23 state court where there is a -- where there is no concrete
24 injury.

25 THE COURT: But the plaintiff cites to a number of

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1 cases in their opposition brief which says that Washington
2 courts are not governed by Article III.

3 You didn't respond to any of those cases in your reply;
4 did you?

5 MR. VANCE: We did not, Your Honor.

6 THE COURT: So can I assume then that you don't have
7 anything to respond with in that regard? I mean, they cite --
8 plaintiff cites the *Ullery/Fulleton* case, 162 Wn.App, and other
9 cases, suggesting that the standing -- you know, that this
10 whole *Spokeo* argument is a federal Article III standing problem
11 and isn't going to decide whether the states -- a state court
12 is going to say they can bring the case.

13 I mean, Congress clearly gave the plaintiff -- said it's a
14 violation of the statute and allows statutory damages and
15 attorney's fees; does it not?

16 MR. VANCE: What I would point the Court to is the
17 *Wood/Caremark* [sic] case in Missouri, the district court
18 case --

19 THE COURT: Did that case deal with that -- this
20 remand issue?

21 MR. VANCE: It did, Your Honor. And what that court
22 held is that there's a difference between *judiciability* [sic]
23 and the *jurisdiction*, *substantive jurisdiction*. And it says
24 where -- in a case like this, where you don't have -- where you
25 don't have standing, it goes to the *judiciability*. And as that

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1 case acknowledged, and the other cases acknowledged, the courts
2 have not always been clear in distinguishing that. But where
3 you have a case like this, where it's purely a federal statute,
4 a claim on a federal statute, and the plaintiff does not have a
5 concrete injury, what it goes to -- before you even get to
6 jurisdiction, substantive jurisdiction, you get to the question
7 of justiciability. And justiciability goes to the issue of does
8 a particular plaintiff have a claim. It doesn't go to does the
9 Court have jurisdiction over the claim in general.

10 There's no question that the FCRA claim here, the Court
11 has jurisdiction over. The question is, does that particular
12 plaintiff? And where the particular plaintiff doesn't, that
13 court ruled that it's a failure to state a claim, and that
14 dismissal is appropriate.

15 THE COURT: Thank you.

16 MR. VANCE: Thank you, Your Honor.

17 THE COURT: Well, they've been going for a half hour,
18 those defendants, so I guess you get a half hour if you want
19 it.

20 MS. DRAKE: Very well, Your Honor. Thank you.

21 THE COURT: Hopefully, you can convince me to the
22 contrary in less than that time. But take what time you need.

23 MS. DRAKE: Please let me know when to stop if I've
24 convinced you, because the last thing I want to do is keep
25 going and un-convince you.

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1 So I'd actually like to start with what I think is at the
2 root of defendants' argument. And it goes something like
3 this -- in fact, Mr. Vance just articulated it very well. How
4 can plaintiffs possibly complain that the defendants procured
5 consumer reports on them when they signed these documents
6 allowing the defendants to do that? At the end of the day,
7 that is defendants' fundamental argument: How can there
8 possibly be an invasion of privacy if the plaintiff signed
9 these documents, and if they don't say, "Well, if the documents
10 had looked the right way, I wouldn't have signed"?

11 THE COURT: I think their argument is a little
12 different, and that is that you need standing, and you need to
13 allege a concrete injury. You have alleged a statutory
14 violation. You have not alleged, I think, anything else.

15 MS. DRAKE: I would -- we have alleged a statutory
16 violation, and I would argue that that entails a concrete
17 injury, and here's why. The default rule is that consumer
18 reports are private. The Fair Credit Reporting Act supplanted
19 the common law. It says you can't sue for common law invasion
20 of privacy anymore when it involves a consumer report. Your
21 recourse is under the Fair Credit Reporting Act. No one can
22 get a consumer report on anyone else unless they have a
23 permissible purpose under the Fair Credit Reporting Act.

24 THE COURT: And applying for a job, is that a
25 permissible purpose?

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1 MS. DRAKE: Under the Fair Credit Reporting Act,
2 there are two things that allow an employer to procure a
3 report. They have to have made a stand-alone disclosure, and
4 they have to have received authorization to procure the report
5 in writing.

6 It's important, Your Honor, in the employment context, the
7 Fair Credit Reporting Act is different than in many other
8 contexts. So if I go to a bank and apply for a loan, for
9 example, the bank can just get my credit report. I don't have
10 to authorize anything. They don't have to tell me anything.
11 They automatically have that right by virtue of the fact that I
12 applied for a loan. That's what the Fair Credit Reporting Act
13 says.

14 In the employment context, there are additional
15 requirements. And it's a requirement of informed consent. The
16 employer has to make a particular disclosure to the consumer,
17 "We are going to procure a consumer report on you for
18 employment purposes."

19 THE COURT: What's the difference with -- whether you
20 have one document that the person signs, that has both the
21 consent and the disclosure, or two documents, and you separate
22 it out? I mean, could the defendants, both of these
23 defendants, have given the applicant two pieces of paper and
24 complied with the statute?

25 MS. DRAKE: Well, Your Honor, the statute explicitly

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1 allows the disclosure and the authorization to be in the same
2 document. That's not what plaintiffs are complaining about.
3 What the statute does not allow is anything else, such as a
4 liability release; a broad release of information to third
5 parties, which in this case, as to both defendants, covered
6 records that are otherwise protected from disclosure: School
7 records; financial records; medical records. The defendants
8 put everything, the whole kit and caboodle, into this one form.
9 And so when the Court says, you know, what's the difference if
10 it's one document or two documents, my response would be,
11 Congress said that there is a difference, and the reason is
12 because Congress wanted informed consent.

13 Defendants' documents, right, they say, "Look, it's still
14 one page" --

15 THE COURT: Congress said that you shouldn't have the
16 expiration date of your credit card on the receipt. I mean,
17 they said a lot of things in the Fair Credit Reporting Act that
18 are procedural violations.

19 But the question is, do you allege a concrete injury?

20 MS. DRAKE: They're different, Your Honor. There's
21 nothing in the legislative history of the FACTA credit card
22 truncation to indicate that Congress was concerned about
23 privacy, in and of itself. The whole congressional record is
24 identity theft, is there a risk of identity theft; okay?

25 So earlier, when the plaintiffs in that FACTA case were

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1 arguing, they were saying, "Look, there's an increased risk of
2 tangible harm," namely identity theft. That's not my argument.

3 The harm here is that defendants procured reports on our
4 clients when they had no legal right to do so. The only way
5 that they get a right to procure this information -- the
6 default is that it's private, that they don't get it -- is if
7 they obtain informed consent. Here, they didn't do that. They
8 published documents that have all kinds of other information in
9 them, that conflate what the consent is to. Umpqua's form
10 doesn't even name Umpqua on it. I mean, they say, "Oh, the
11 plaintiff signed this document."

12 Here's the document that the plaintiff in Umpqua signed.
13 Umpqua is not even named. Here, it starts off, the document
14 that's supposed to create informed consent, "We're going to get
15 your consumer report. Please authorize us to do that." That's
16 all it's supposed to say. It starts off by telling the
17 plaintiff, in teeny, tiny little print, "Anyone who obtains
18 information on a consumer, from a consumer reporting agency,
19 under false pretenses shall be fined not more than \$2,500."

20 What does a layperson think when they start thinking about
21 fines of \$2,500? The Court sent out class notices and had
22 inquiries from class members, or dealt with laypeople who don't
23 understand legal disclosures. They don't go, "Oh, wait. That
24 only applies if they get a report on me without" -- they go,
25 "\$2,500 fine, that sounds scary. What is this thing?" And

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1 then it says, "Oh, and you release us from all liability, and
2 we can get all this information from over here, and we can get
3 all this information from over there."

4 Congress said that's not good enough. This is very
5 private information. This isn't the expiration date on your
6 credit card. This is your Social Security number, your credit
7 history, your employment history, your criminal background,
8 drug and alcohol test results from defendants' form. The
9 default is, this is private, and employers can only get it when
10 they get informed consent. That means providing clear and
11 conspicuous stand-alone disclosure, and get authorization in
12 writing.

13 And the idea of informed consent, or consent that has to
14 look a certain way, isn't foreign, and it's not procedural.
15 Take the statute of frauds, Your Honor. What if I came into
16 court and I said, "In the hallway before court today, Mr. Vance
17 agreed to sell me his home for \$3 in the next five minutes.
18 And he didn't do it, so I'd like you to enforce that
19 agreement." You'd say, "Ms. Drake, that's crazy. Those kinds
20 of agreements have to be in writing." And I'd say, "Oh, it's
21 just procedural, Your Honor. He agreed. He admits he agreed.
22 Three bucks, I get his whole house. Enforce it." You'd say,
23 "No. That kind of consent is not valid in court." And that's
24 a common law that's not valid.

25 So the idea that Congress now can't circumscribe the

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1 particular circumstances in which consent has to occur, of
2 course they can. That's why Judge Payne, in *Thomas*, said this
3 is a substantive right. It's why the Eleventh Circuit said the
4 right to receive this information is substantive. I'd
5 encourage the Court to look at the Third Circuit's opinion in
6 *In Re Nickelodeon*.

7 THE COURT: Oh, I read it.

8 MS. DRAKE: That's a very favorable case for us. The
9 Third Circuit said the violation here is obtaining this
10 information in circumstances when you did not have a legal
11 right to do so. That's all the video privacy protection act is
12 about.

13 THE COURT: Well, the *Nickelodeon* case is so far
14 removed, I think, from this case. I mean, there, there was the
15 internet cookie technology and information about the kids'
16 browsers you could -- I mean, if I had those facts, you'd be --
17 I'd ask you to sit down, and I'd rule in your favor. But I
18 think that's a case that's got its own particular facts, and I
19 don't think it particularly informs the Court, doesn't inform
20 me on what I should do here.

21 MS. DRAKE: I think that the facts there are more
22 sympathetic, but the principle is the same, which is that,
23 remember, Article III is about separation of powers; right?
24 The whole point is to not involve courts in decisions that are
25 best left for other branches. So the Court can't make a

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1 principled decision in saying, "Well, of course Congress has
2 the right to decide that you can't have video-related
3 information if that involves minors and cookies, because that's
4 creepy." No. Congress can either say you get this
5 information, or you don't. And that is an appropriate
6 congressional decision.

7 I would also encourage the Court to look at the case that
8 the Eighth Circuit issued. Actually, both Eighth Circuit cases
9 I think are favorable to plaintiffs. The first is the
10 *Braitberg* opinion, *Braitberg vs.* -- I believe it's *Charter*.

11 THE COURT: That's the Cable Communication Policy Act
12 case.

13 MS. DRAKE: It is. And in that case, what the Court
14 said is this: There's no standing, because there's no question
15 that *Charter* had a right to have this information. The
16 violation is simply that *Charter* kept the information for too
17 long. But that language in the *Braitberg* opinion, about the
18 fact that *Charter* had a legal right to the information in the
19 first instance, is beneficial to plaintiffs. Because here,
20 defendants don't.

21 Remember, Your Honor, the violation that plaintiffs allege
22 is not just getting the wrong form. The violation is only
23 complete when defendants go on and get plaintiff's consumer
24 reports. It's that they didn't have a right to the
25 information, because they didn't obtain informed consent.

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1 And the very next day, after *Braitberg* -- the defendants
2 were so excited about *Braitberg*. They all viewed it as
3 favorable to them. I think in this context, it's favorable to
4 us. But the very next day, the Court issued another opinion,
5 which is even better for plaintiffs, *Farmers vs. EPA*. That was
6 a reverse Freedom of Information Act claim. And there, the
7 Farmers Association sued the Environmental Protection Agency
8 for releasing their names and addresses in response to a FOIA
9 request. They said, "Wait a minute. That's private
10 information. You can't release that in response to a FOIA
11 request. We're suing you. It's statutorily protected."

12 THE COURT: Now, is that cited in your brief? That's
13 one case I'm not familiar with.

14 MS. DRAKE: Yes, Your Honor.

15 THE COURT: I read a lot of cases.

16 MS. DRAKE: We submitted it in our second notice of
17 supplemental authority, on September 14. And the case number
18 is 15-1234.

19 THE COURT: But it's your second supplemental -- all
20 right. We'll find it.

21 MS. DRAKE: That's correct. It's the second
22 supplemental authority in the BBSI case, Your Honor, in
23 Dougherty.

24 But there -- so the EPA says, "How can you possibly
25 complain? How can you possibly have standing? If we released

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1 your name and your address and your -- that kind of banal
2 information, that's already out there. Anybody can get your
3 name and address." The Eighth Circuit, probably the most
4 conservative circuit court in the country, said "standing."
5 That information was statutorily protected from disclosure.

6 Privacy injuries, they are the quintessential and tangible
7 harm that the court was talking about in *Spokeo*. There's no
8 way to invade somebody's privacy other than by just obtaining
9 information about them that you don't have a right to get. And
10 we can't start, in court, under the guise of a constitutional
11 provision aimed at protecting the separation of powers, to say
12 "Well, Congress said you have to get informed consent."
13 Congress said you have to give this kind of information, and
14 you have to get written authorization. We can't then back off
15 that and say, "Well, you know what, just written authorization
16 alone, that's enough." That's the substantive part. The
17 provision of the information, that's just procedural.

18 What if defendants had come in and said, "You know what,
19 Your Honor, we don't have written authorization, but
20 Mrs. Dougherty called us on the phone and said we could get it.
21 Plaintiffs don't have standing." Would that -- would then the
22 written authorization requirement just be procedural? Of
23 course not. You can't, under the guise of Article III,
24 defendants can't, and this Court should not, start walking back
25 off of Congress's ability to specify the circumstances in which

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1 one party can obtain private information about someone else.

2 And it's not new or foreign that this information is
3 private. Plaintiffs cited a Supreme Court case, *Department of*
4 *Justice vs. The Reporters Committee*. It's 489 US 749, 1989.
5 That's a 1989 case that's about the fact that compilations of
6 information on individuals, even when all the information
7 itself is already public, are still entitled to privacy
protection.

8 So remember, what defendants did here is, they procured
9 information that is indisputably private. The only way they
10 get a right to that information is through the Fair Credit
11 Reporting Act. And what they want to argue is, "Well, we get
12 that it's private, and we also admit" -- counsel for Umpqua
13 admitted his form doesn't comply. The Court's already ruled on
14 the motion to dismiss that plaintiffs have stated a claim --
15 "Yeah, we didn't comply with the statute" --

16 THE COURT: That case has been around for a long,
17 long time. I think it's on -- anyway, it's an old case.
18 You're right.

19 MS. DRAKE: Yeah. So, you know, they want to say,
20 well, yeah, the information is protected. It's private. The
21 only way we can get it is through compliance with the statute,
22 but we don't really have to totally comply with the statute.
23 If we, like, get close, that's good enough. So just go with
24 the written authorization part, Your Honor. We don't really
25

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1 have to provide the information the statute says we also have
2 to provide. Any old consent is good enough. Don't worry about
3 whether it's informed consent. We think we informed them
4 enough. We think our form is good enough. You should do that
5 too, and you should do it as a constitutional matter. No.
6 That is Congress's purview.

7 And that's what the Eleventh Circuit was getting at, in
8 *Church vs. Accretive Health*. That's why this case is valuable
9 to plaintiffs. *Church* was a Fair Debt Collection Practices Act
10 case, where the Fair Debt Collection Practices Act specified
11 that consumers are entitled to receive certain information in
12 connection with communications regarding the collection of a
13 debt. All the plaintiffs in that case had to demonstrate is
14 that they didn't get the information they were entitled to.
15 They didn't have to show that it hurt them in some way that
16 they didn't get the information. They didn't have to show that
17 they paid the debt when they otherwise would not have paid the
18 debt. They didn't have to show any of that. That is the
19 quintessential instance in which simply not receiving
20 information that Congress said it's important for a consumer to
21 receive was sufficient.

22 *Havens*, the case that the Court brought up earlier, is a
23 perfect example, highly analogous to the present circumstance.
24 In fact, I would argue our facts are better than *Havens*; right?
25 In *Havens*, these people go out, and they say, "We're going to

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1 test." Right? "We want to see if these landlords are
2 violating the Fair Housing Act. They're supposed to give
3 African-Americans certain kinds of information when we apply
4 for housing. We're going to go see if they give it to us."
5 Lo-and-behold, the landlords didn't. Those individuals had no
6 intention of actually living in those buildings. But the Court
7 found that even they still -- they didn't even want the
8 information, or need it, and they still had standing.

9 Here --

10 THE COURT: That was before *Spokeo*.

11 Do you think the result would be the same?

12 MS. DRAKE: I do. I do think it would be the same.
13 In fact, part of the reason I think it would be the same is
14 because in *Spokeo*, the Supreme Court cited to two other
15 informational injury cases, *Federal Election Commission vs.*
16 *Akins* and *Public Citizen vs.* -- I believe it's the *American Bar*
17 *Association*.

18 In both of those cases, the plaintiffs had sued, saying,
19 "Hey, we made Freedom of Information Act requests, and you
20 didn't give us everything that we're entitled to. The
21 violation, the injury, they were the same; right? We just
22 didn't get information we were entitled to." They didn't have
23 to show it hurt them. They didn't have to say, "Oh, and if I
24 had gotten the information, I would have made more money," or,
25 "If I would have gotten the information, I would have voted

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1 differently."

2 There are all kinds of intangible harms that matter;
3 right? The *Voting Rights Act* case, if I'm denied the right to
4 vote, do I have to show that my vote would have been the
5 decisive one? Of course not. That's not what an intangible
6 right means. And that's, frankly, what's wrong with the line
7 of opinions in these stand-alone disclosure cases that have
8 deviated from *Thomas*. You have three cases, *Thomas vs. FTS*,
9 out of the Eastern District of Virginia; *Moody vs. Ascenda*, out
10 of the Middle District of Florida; and *Meza vs. Verizon*, out of
11 the Eastern District of California. The latter two were both
12 cited to the Court in notices of supplemental authority filed
13 by both my client -- clients in both cases, Umpqua and BBSI.

14 In those cases, the *Meza* case and the *Ascenda* case, the
15 courts follow *Thomas*. And they say the reason that cases like
16 *Smith vs. Ohio State* are wrong is because they don't recognize
17 the nature of what a privacy right is. When someone takes
18 something about me, information about me, that they don't have
19 a right to have, that statutory violation and the injury are
20 one and the same.

21 THE COURT: Do they have a right to have it if you
22 consent?

23 MS. DRAKE: Only if I consent in the right way. And
24 that's why I think the statute of frauds is so important here.
25 Because just like at common law, there were certain

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1 circumstances where we say, you know, that's got to be in
2 writing; where we say, you know what, if you're a minor, you
3 just can't; if you're intoxicated, you just can't. A criminal
4 defendant who gives a voluntary statement but isn't Mirandized,
5 that's the analogy here. Well, he gave the statement
6 voluntarily. He didn't say, "Well, if I had gotten my *Miranda*
7 rights, I wouldn't have talked." No. The end.

8 Congress has a right to make those same kinds of
9 bright-line distinctions. If you want this private and
10 potentially damaging information -- both of our plaintiffs
11 weren't hired as a result of the information on their consumer
12 reports. If you want that kind of information about a human
13 being, you have to get informed consent. You don't get to just
14 say, "Well, I think it's good enough, because it's in writing,
15 even though I didn't give the information," or, "Well, I gave
16 the information. Look, right here, it's on this form,
17 sandwiched in between some language about a \$2,500 fine and
18 some other language releasing me from all liability for
19 anything that I might ever do with the information."

20 THE COURT: A little slower.

21 MS. DRAKE: I apologize.

22 THE COURT: So where do you -- you allege that the
23 concrete injury is the statutory violation.

24 Do you -- and you say they invaded plaintiffs' privacy
25 without making an appropriate disclosure and obtaining the

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1 proper authorization.

2 Is that enough?

3 MS. DRAKE: I think it's certainly enough, Your
4 Honor. I don't want to revisit the question of, you know,
5 what's the standard on a motion to dismiss for lack of subject
6 matter jurisdiction.

7 THE COURT: I don't think you need to do that.

8 MS. DRAKE: But I don't believe that plaintiffs have
9 the same obligation, on a motion to dismiss for lack of subject
10 matter jurisdiction, to plead the injury with particularity
11 that they do under an *Iqbal/Twombly* analysis to plead the
12 actual violation. I also don't really know how else you plead
13 invasion of privacy, other than by saying, "You got my
14 information when you didn't have the right kind of
15 authorization to get it." I mean, I could say that in 25
16 sentences, instead of one. And should the Court find that
17 that's required, I will.

18 For example, the Court in the *Moody vs. Ascenda* case,
19 which I just cited to you, out of the Southern District of
20 Florida, that is a case that is in plaintiffs' favor. It's a
21 stand-alone employment case, the same kind of violation.
22 Initially, the Court held that plaintiffs didn't have enough,
23 because they hadn't specifically said in their complaint
24 "informational injury and invasion of privacy." The plaintiffs
25 then amended their complaint and said "informational injury,

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1 invasion of privacy," and the Court ruled in their favor.

2 So if there's more, sort of, meat on why this was an
3 invasion of privacy, along the lines of what I've articulated
4 today, we would certainly be happy to amend. But I think that
5 to the extent the Court can make reasonable inferences, it's
6 clear what we're saying. What we're saying is, this consent
7 isn't good enough. It's not the right kind of consent.

8 Congress retains the ability to say when someone can get
9 private information about someone else. They said you can only
10 do it if you get informed consent. It's an ancient concept.
11 Defendants didn't do that here. And it's up to Congress to say
12 what's good enough. Their forms weren't good enough. That's
13 why courts have been adjudicating these cases for decades.
14 Your Honor adjudicated it.

15 THE COURT: I think I understand your argument.
16 Thank you.

17 All right. I'm going to take the matter under advisement.
18 I'm not going to rule from the bench. I think this is
19 different than the earlier case where I did rule. I think it
20 presents a challenging issue, and we'll issue an order as soon
21 as we can.

22 Thank you for your arguments --

23 MS. DRAKE: Thank you, Your Honor.

24 THE COURT: -- and your briefs. And we'll be in
25 recess.

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1 Have a nice day, folks.

2 (Adjourned)

3 (End of requested transcript)

4 * * *

5 I certify that the foregoing is a correct transcript from
6 the record of proceedings in the above matter.

7

8 Date: 1/3/17 /s/ Andrea Ramirez

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11 Signature of Court Reporter

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